



on the eligibility of rural telephone companies to participate in the auction of in-region Local Multipoint Distribution Service (“LMDS”) licenses.

### **BACKGROUND**

In the *Second R&O*, the Commission prohibited incumbent local exchange carriers (“ILECs”), including rural telephone companies<sup>3</sup>, from holding the 1,150 megahertz LMDS license for any Basic Trading Area (“BTA”) that significantly overlaps the ILEC’s wireline service area.<sup>4</sup> Significant overlap occurs if 10% or more of the population of the BTA or partitioned area is within the ILEC’s authorized telephone service area.<sup>5</sup> A rural telephone company or other ILEC may participate in the auction for a BTA that significantly overlaps the ILEC’s telephone service area, but the ILEC must divest itself of the significantly overlapping LMDS service area (or attributable ownership interest in the LMDS licensee) within 90 days of the grant of the LMDS license.<sup>6</sup>

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<sup>3</sup> The Commission’s LMDS in-region eligibility restrictions apply to all ILECs. *See* 47 C.F.R. § 101.1003(a). In the *Second R&O*, the Commission declined to exclude rural telephone companies from the ILEC in-region eligibility restrictions adopted therein. *See Second R&O* at ¶¶ 179-180. Accordingly, WebCel’s proposals, if adopted, would apply to and would adversely impact rural telephone companies.

<sup>4</sup> *Second R&O* at ¶ 160, 179; 47 C.F.R. § 101.1003(a). This rule also prohibits a rural telephone company from partitioning an LMDS service area that significantly overlaps the rural telephone company’s telephone service area. *Second R&O* at ¶ 180.

<sup>5</sup> 47 C.F.R. § 101.1003(d).

<sup>6</sup> *See Second R&O* at ¶ 194; 47 C.F.R. § 101.1003(f).

In its Petition, WebCel argues that ILECs should not even be allowed to participate in the *auction* to bid on in-region licenses.<sup>7</sup> WebCel at 12-17. WebCel argues that at a minimum, ILECs must be required to divest their overlapping telephone facilities prior to the auction or by a date certain following the auction. WebCel at 16. RTG opposes each of these proposals.

As RTG will demonstrate, the additional restrictions which WebCel proposes, would effectively prohibit rural telephone companies from participating in the provision of LMDS and would frustrate Congress' universal service objectives. WebCel's proposal, as applied to rural telephone companies, would violate the mandate of Section 309(j) of the Communications Act of 1934, as amended ("the Act"), that the Commission ensure rural telephone companies a meaningful opportunity to participate in the provision of spectrum-based services such as LMDS. Additionally, because of the universal service obligations imposed on rural telephone companies, WebCel's proposal that ILECs first divest themselves of their overlapping telephone facilities in order to be eligible to participate, is illegal under the Act. Accordingly, at least as applied to rural telephone companies, the additional eligibility restrictions which WebCel proposes in its Petition violate the Act, and the Commission should deny those portions of WebCel's petition.

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<sup>7</sup> LBC Communications, Inc. ("LBC") also filed a Petition for Reconsideration on May 29, 1997 requesting that the Commission preclude ILEC participation in in-region LMDS auctions. LBC supported its petition by adopting the Comments of WebCel filed April 21, 1997 in Docket No. 92-297. RTG filed Reply Comments on May 6, 1997, refuting the arguments contained in WebCel's April 21 Comments.

## Argument

### I. Rural Telephone Companies Must Be Afforded an Opportunity to Acquire LMDS Spectrum Through the Auction Process.

RTG opposes any general limitation on ILEC eligibility to acquire LMDS licenses through the auction process, and strenuously opposes any limitation on rural telephone company eligibility in particular. On May 29, 1997, RTG filed a Petition for Reconsideration (“RTG Petition”) requesting that the Commission reconsider and eliminate its LMDS eligibility restrictions on rural telephone companies. RTG’s opposition to eligibility restrictions on rural telephone companies is further detailed in its Comments in response to the *Fourth Notice of Proposed Rulemaking* (“*Fourth NPRM*”) in this docket.<sup>8</sup> In those comments RTG requested that the Commission make an exception for telephone companies serving rural areas if the Commission were to impose restrictions on LEC in-region eligibility. By allowing rural telephone companies to participate fully in the LMDS auctions the Commission will provide rural telephone companies with at least some opportunity to acquire spectrum to participate in the provision of new and innovative services in conformance with the mandate of Section 309(j) of the Act. In the unlikely event that RTG is unsuccessful in obtaining the relief it seeks in its Petition for Reconsideration, RTG requests that the Commission keep its current rule which imposes short-term, in-region eligibility restrictions on rural telephone companies and other ILECs, and allow rural telephone companies and other ILECs to participate in the LMDS auction subject to divestiture of any overlapping *LMDS service area* within 90 days.<sup>9</sup>

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<sup>8</sup> See Comments of the Ad Hoc Rural Telecommunications Group, RTG’s predecessor-in-interest, filed August 12, 1996.

<sup>9</sup> See *Second R&O* at ¶ 194

**A. Additional Restrictions on Rural Telephone Companies Violate the Act**

WebCel's suggestion that ILECs be required to divest their telephone facilities in order to be eligible to participate in the auction, as applied to rural telephone companies, is abhorrent to Section 309(j) of the Act and would effectively eliminate rural telephone company participation in LMDS entirely. Congress required the Commission to provide meaningful opportunities for rural telephone companies to participate in spectrum-based services. Congress did not condition that participation on a rural telephone company's willingness to curtail its wireline telephone operation. There is no basis in the Act for requiring a rural telephone company to eliminate its telephone service in order to be eligible to participate in spectrum-based services.

Indeed such reduction in telephone service plainly violates the universal service goals embodied in the Act.<sup>10</sup> Surely Congress did not intend that rural Americans suffer loss of their basic telephone service in order to receive access to advanced telecommunications services. In addition, as a state-designated "eligible carrier," a rural telephone company is prohibited from terminating telephone service to the area of overlap with the LMDS BTA in the absence of a second "eligible carrier" serving the same area.<sup>11</sup> In such circumstances, under WebCel's proposal, a rural telephone company would be prohibited by law from participating in the LMDS auction in direct violation of Section 309(j) of the Act. Accordingly, WebCel's proposal that ILECs be required to divest their overlapping telephone operations, as applied to rural telephone companies, directly contravenes numerous provisions of the Act and must not be countenanced.

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<sup>10</sup> 47 U.S.C. § 254(b)(3).

<sup>11</sup> See 47 U.S.C § 214(e) (FCC or state may require carrier to provide universal service).

**B. Rural Telephone Companies Will Not Engage In “Gaming”**

There is no evidence that rural telephone companies will engage in the kind of “gaming” with which WebCel is concerned or that their participation will distort the auction process. WebCel suggests that a winning ILEC, having bid-up the auction price, might fail to make the required 90-day divestiture and default on its auction deposit. WebCel at 15. WebCel states that this would be a “small price to pay” for an ILEC for forestalling competition. WebCel at note 31 and accompanying text. This is sheer speculation on WebCel’s part, and has absolutely no basis in fact. First of all, rural telephone companies lack the “billions of dollars” in assets that WebCel suggests would justify such gaming. In addition, unlike some newly formed entrepreneurial auction participants, rural telephone companies have a long and honorable history of service to the public and compliance with the FCC’s rules and regulations. Moreover, rural telephone company participation in FCC spectrum auctions to date has yielded not a single example of a rural telephone company strategically choosing to violate the FCC’s rules by purposefully defaulting on an auction payment or by other “games” suggested by WebCel.

**C. Partitioning Alone Will Not Provide Rural Telephone Companies With An Opportunity to Participate in LMDS**

WebCel argues that aftermarket partitioning alone will afford ILECs with legitimate entry opportunities. WebCel at 16. Here again, at least as applied to rural telephone companies and rural areas, partitioning alone does not provide rural telephone companies with an opportunity to acquire LMDS spectrum nor does partitioning ensure that LMDS is rapidly deployed to rural America. As RTG has previously and repeatedly warned the Commission, many licensees are unwilling to partition smaller geographic areas because (1) they find it more burdensome than profitable and/or (2) they ultimately intend to sell their systems to a larger operator and do not

want to carve up the license area.<sup>12</sup> RTG has found licensees in other services, such as Personal Communications Services (“PCS”) and Multipoint Distribution Services (“MDS”), generally uninterested in consummating partitioning deals. In fact, more than a dozen major wireless companies have reported to RTG a lack of interest in partitioning arrangements.

## **II. THE COMMISSION SHOULD PROVIDE BENEFITS TO VERY SMALL BUSINESSES**

RTG concurs with WebCel and with those other parties requesting that the Commission include a category of “very small business” in the LMDS auction.<sup>13</sup> Such a classification will help designated entities compete for LMDS licensees. The inclusion of a very small business category is especially warranted given the capital intensive nature of LMDS. Without additional incentives, small businesses and other designated entities will be unable to afford to purchase LMDS licenses and effectively deploy LMDS systems.

## **CONCLUSION**

Section 309(j) of the Act requires that the Commission provide rural telephone companies with a meaningful opportunity to acquire LMDS licenses through the auction process. Any additional restrictions beyond the current in-region divestiture requirement would further violate Section 309(j) by denying rural telephone companies any opportunity to obtain licenses. Additionally, WebCel’s proposal would violate Section 254 of the Act by frustrating Congress’

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<sup>12</sup> See, RTG’s Comments and Reply Comments in response to Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Service Licensees; Implementation of Section 257 of the Communications Act--Elimination of Market Entry Barriers, *Notice of Proposed Rulemaking*, WT Docket 96-148, GN Docket No. 96-113 (“*PCS Partitioning NPRM*”); RTG’s Comments filed June 18, 1997, *in re* Amendment of the Commission’s Rules to Establish New Personal Communications Services, Narrowband PCS; Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Narrowband PCS, GEN Docket No. 90-314, ET Docket No. 92-100, PP Docket No. 93-253.

<sup>13</sup> See WebCel Petition at 5; Petition for Reconsideration of Cook Inlet Region, Inc., filed May 29, 1997 at 3-5.

universal service objectives. Partitioning and the LMDS "aftermarket" alone do not provide rural telephone companies with adequate opportunity to acquire LMDS spectrum. Accordingly, the Commission should deny WebCel's Petition at least to the extent that the proposals therein would impose further restrictions on rural telephone company participation in the LMDS auction.

Respectfully submitted,

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### Certificate of Service

I, Jacqueline R. Jenkins, an employee in the law firm of Bennet & Bennet, PLLC, hereby certify that a copy of the foregoing "Partial Opposition to Petition for Reconsideration" has been served, via first-class, U.S. Postage pre-paid mail, this 2nd day of July, 1997 on the following:

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